On November 20, 1991, a contested case hearing was held in (city), Texas, to determine whether respondent (claimant below) sustained an injury in the course and scope of his employment with (employer). The hearing officer, (hearing officer), determined that claimant sustained an injury in the course and scope of his employment on (date of injury), and that he was entitled to recover temporary income benefits (TIBS) and medical benefits. Carrier, who is the employer's insurance carrier, challenges the factual sufficiency of the evidence to support the hearing officer's Findings of Fact Nos. 4 through 6 and 9 through 12, Conclusions of Law Nos. 3 through 6, and the Decision and Order. Carrier contends that the overwhelming weight of the evidence is against the findings of the hearing officer leading to the conclusion that claimant sustained a compensable on-the-job injury resulting in disability entitling him to TIBS. Carrier requests that the hearing officer's decision be reversed and a decision rendered in its favor. Claimant, who represented himself at the hearing, did not file a response to the request for review.

DECISION

We affirm the hearing officer's decision and order.

In ruling on a question of factual sufficiency of the evidence, we consider and weigh all the evidence in the case and should set aside the hearing officer's decision if we conclude that the decision is so against the great weight and preponderance of the evidence as to be manifestly unjust. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Claimant started working for employer on July 20, 1991. He testified that on (date of injury), while at work carrying a 10' by 4' piece of drywall for his employer, he felt pressure, "shocks," and pain in his lower back for about four or five minutes and stopped working during that period. When the pain went away he continued his work. He said he experienced the same symptoms while hanging drywall for his employer on August 8th or 9th, and then again on August 15th or 16th. The second incident lasted four or five minutes and the third incident lasted seven or eight minutes, although after the third incident he felt pressure in his lower back most of his work day. He said he told a co-worker, (RA), who is also his friend and roommate, that he did not feel well on each occasion, and, on the third occasion switched jobs with RA because of the pain. RA's job was to fasten the drywall into place after claimant carried the drywall and lifted it into position. Although he knew he was to report all injuries to his employer, claimant testified that he told no one at work, other than his co-worker, Mr. RA, about his incidents of back pain when they occurred because he felt they were not important or major enough to report. After each incident, he continued to work after the pain abated. Carrier further testified that while off of work on Saturday, August 17, 1991, he felt a lot of pain and pressure in his lower back while pushing a grocery cart and that he had to sit down for about ten minutes because of the pain. He stated that the pain he experienced in the grocery store did not go away, that he had to sleep on the floor that night because of the pain, and that his back pain continued on Sunday.

Carrier further testified that he called his superintendent, (KP), at work on Monday morning, August 19, 1991, and told him that he could not go to work and was going to see a doctor. He said he did not tell the superintendent why he was going to a doctor. Later that morning, claimant said he was examined by (Dr. J), a chiropractor. He said this doctor took x-rays, examined him, told him his "back was bad" and "something about two discs," gave him gel to use on his back, and gave him a paper to take to his employer for "workmans' comp." The next day, August 20th, claimant said he gave the paper Dr. J gave him to a secretary at work, talked to KP, his superintendent, on the telephone, and then saw Dr. A at

the request of the superintendent. Claimant testified that he told his superintendent he had been hurt on the job, but that he really didn't know when it happened or didn't know the dates it happened when he spoke to him on August 20th. Claimant said that Dr. A took more x-rays, told him he had a low back strain, and sent him to physical therapy. Claimant stated that he went to therapy for about 14 days, had two more visits with Dr. A, and that on September 16th Dr. A told him the doctor could not see him anymore because "they" were denying his claim. He testified that Dr. A never released him to go back to work. After September 16th claimant did not see any more doctors because he said he could not afford to do so.

Claimant also testified that he has had severe and constant problems with his back since August 17th, continues to have "shocks" and "pressure" in his low back, and has not been working. He said he talked to his superintendent about getting unemployment benefits, but denied asking him about going back to work. Claimant stated that he was treated by a doctor and received therapy for a prior back injury he sustained in a motor vehicle accident in February 1991. He said the doctor who treated him for his prior injury released him on June 6, 1991, and that he felt no more pain and had completely recovered from his prior back injury at that time. No medical records or reports concerning the prior injury were introduced into evidence by either party. Claimant further stated that before (date of injury), he had never experienced the "shocks" which he felt that day.

There were some inconsistencies in claimant's testimony. For example, while he testified to three separate incidents where he experienced pain at work, on cross-examination he testified that the pain "was about the same almost every day." But he explained that the three work incidents he had previously testified about were the "worst that I could feel." He also showed some confusion as to the location of the job site on (date of injury); first testifying that it was in (city) and later agreeing that it was in (city). Also, from the testimony of other witnesses and medical reports in evidence, it appears that claimant may have been a day or so off in recalling the dates he went to the doctors and the date he told his superintendent he needed to see a doctor. He may also have been confused as to which doctor sent him to physical therapy.

In a transcribed, recorded statement, claimant's coworker, RA, said that he knows what happened at work; that suddenly claimant's back hurt; that claimant told him he felt hurt since (date of injury); and that claimant was very ill from that date until August 22nd. He also said he would not lie for claimant, and that he would be a witness for claimant in a court of law.

(Mr. B), the employer's sheetrock foreman, testified that claimant worked for him on (date of injury); that he had contact with claimant for about six hours that day; that claimant didn't report a back injury to him; that he didn't observe any signs indicating claimant was injured or was having problems doing his job; that hanging sheetrock is fairly heavy manual labor; and that if someone was having a problem he would know about it.

KP, employer's superintendent, testified that claimant called work on August 19th and 20th and told the secretary he was sick; that on August 21st claimant came to the shop, asked if he had anything for him to do, told him he had been sick and "about the problem that he had with his back;" and that he (KP) immediately sent claimant to "our clinic" to get back x-rays and a full physical. This witness testified that, although claimant did not mention when or where he hurt his back, it was his impression that claimant was telling him it had happened on the job. This witness further testified that claimant called him on November 14, 1991, and asked "if I had anything." He said he told claimant, "no," and that

he could not put him back to work until he had a release from the doctor. He said claimant also asked if he could put him on unemployment and that he told claimant, "no." This witness also stated that claimant was never at any time laid off.

Carrier introduced into evidence medical reports of Doctors J and A. Dr. J's report dated August 29, 1991, reveals that he examined claimant on August 20, 1991; that claimant told him he was hanging sheetrock and began experiencing back pain; that claimant complained of low back pain radiating into his legs; and that claimant told him about his prior back injury, but indicated it was asymptomatic prior to his injury on (date of injury). This doctor diagnosed "subluxation of multiple cervical vertebra; cervical sprain/strain; thoracic sprain/strain; facet syndrome; lumbosacral sprain/strain; sciatica." X-rays were taken and sent to a radiologist for further evaluation. Dr. J stated he would withhold a prognosis until a response to the treatment program he placed claimant on could be ascertained. This doctor indicated it was "undetermined" as to when claimant could return to work or achieve maximum medical improvement (MM).

Dr. A's report dated August 21, 1991, reveals that he examined claimant on August 21, 1991; that claimant told him he thought he injured his back lifting drywall; and that claimant told him about his prior back injury of February 1991. Dr. A diagnosed "low back strain," noted that an x-ray of the lumbar spine was negative, and prescribed a treatment plan of "rest, off work, medications." His prognosis was that claimant would be off work for four days and he anticipated no permanent disability.

Also in evidence was claimant's transcribed, recorded statement of September 3, 1991, which is generally consistent with his testimony at the hearing. Over carrier's objection that it was not relevant, the hearing officer admitted into evidence the "Employer's Wage Statement" (TWCC-3) as Hearing Officer Exhibit No. 1. The wage statement reflected wages paid to a similar employee for 13 weeks.

The pivotal findings and conclusions complained of on appeal are Findings of Fact Nos. 4 and 9, and Conclusions of Law Nos. 3, 4 and 5, which are as follows:

FINDINGS OF FACT

4.On (date of injury), the Claimant injured his back while engaged in his duties as a plasterboard installer for the Employer.

9.At the time of this hearing, the Claimant still suffered pain and discomfort as a result of the injury sustained on (date of injury), including "shocks" in his lower back; in the interim, he was unemployed and unable to work as a result of his injury.

CONCLUSIONS OF LAW

3. The Claimant sustained an injury in the course and scope of his employment on (date of injury).

4. The Claimant has suffered disability, as defined, from (date of injury), through the present date, and has yet to obtain [MMI], as defined.

5. On August 19, 1991, the Claimant first began to lose income as a result of this injury.

As we see it, the thrust of carrier's argument is that, if claimant was involved in an incident at work, it was something minor which quickly resolved and there is insufficient evidence to show that it resulted in damage or harm to the physical structure of his body. In addition, carrier argues that there is insufficient evidence to show that any disability following the grocery store incident on August 17th related back to the (date of injury) alleged incident at work.

Under the 1989 Act, a "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act," and an "injury" means "damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm." Article 8308-1.03(10) and (27). "Disability" is defined as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Article 8308-1.03(16).

The hearing officer is the trier of fact in a contested case hearing, and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e) and (g). As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). He or she is privileged to believe all or part or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer is not bound to accept the testimony of the claimant at face value. Garza, *supra*. However, the claimant's testimony, if believed, can support a finding of injury in the course and scope of employment. Highlands Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ). The weight to be given conflicting expert testimony is also a matter for the trier of fact. Atkinson v. United States Fidelity Guaranty Co., 235 S.W.2d 509 (Tex. Civ. App.-San Antonio 1950, writ ref'd n.r.e.).

We find that Finding of Fact No. 4 and Conclusion of Law No. 3 relating to injury in the course and scope of employment are sufficiently supported by the evidence in this case. The hearing officer apparently believed, as he was entitled to, claimant's testimony that he injured his back while hanging drywall for his employer. Claimant's testimony on this matter is somewhat corroborated by his coworker's statement. The fact of damage or harm to the physical structure of his body is supported by claimant's testimony concerning immediate pain, pressure, and "shocks" while hanging the drywall and by the doctors diagnoses of back sprain or strain.

We also find that Finding of Fact No. 9 and Conclusions of Law Nos. 4 and 5 relating to claimant's disability are sufficiently supported by the evidence. In addition to claimant's testimony concerning his continuing back problems and his not working after August 17th, there are also KP statements that claimant was not laid off work and that he could not allow claimant to return to work until claimant obtained a release from the doctor. Moreover, Dr. J indicated in his report that it was "undetermined" as to when claimant could return to work or would reach MMI. Although Dr. A anticipated that claimant could return to work within 4 days of his visit on August 21, 1991, claimant testified that this doctor never released him to return to work. Claimant's testimony provided a sufficient causal connection between the pain and pressure to his low back he felt at work while carrying and hanging drywall, the subsequent diagnosis of back sprain or strain, and his disability. *See* Baugh, *supra*.

We also find that the other challenged findings and conclusions, namely Findings of Fact Nos. 5, 6, 10, 11, and 12, and Conclusion of Law No. 6 are sufficiently supported by

the evidence, as are the decision and order of the hearing officer.

We note that while carrier states that the hearing officer erred in finding in his decision and order that claimant is entitled to receive TIBS at the specific rate of $297.73 per week, carrier fails to give any indication of how this amounted to error. The hearing officer had before him the Employer's Wage Statement from which he could compute average weekly wage and then apply the applicable provisions of the 1989 Act to arrive at the amount of TIBS. Although carrier's objection to the introduction of this document was overruled at hearing, carrier does not complain of the hearing officer's ruling on that objection on appeal. Furthermore, the decision and order provided for the reduction of TIBS pursuant to Article 8308-4.23. *See* Texas Workers' Compensation Commission Appeal No. 91045 decided November 21, 1991, relating to eligibility for TIBS.

We also note that Conclusion of Law No. 4 should have used August 19, 1991, and not (date of injury), as the date claimant suffered disability under the facts of this case. However, any error in stating (date of injury) as the date of disability was cured by Conclusion of Law No. 5 wherein the hearing officer concluded that on August 19th, 1991, claimant first began to lose income as a result of his injury, and by the decision which awards TIBS from August 19, 1991.

Finding that the hearing officer's findings, conclusions and decision are sufficiently supported by the evidence, and that the findings, conclusions and decision are not so against the great weight and preponderance of the evidence as to be manifestly unjust, we affirm the hearing officer's decision and order.

_____

Robert W. Potts
Appeals Judge

CONCUR:

_____

Joe Sebesta
Appeals Judge

_____

Susan M. Kelley
Appeals Judge